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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 147.

JOHN R. LONGO,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

On Petition for Writ of Certiorari.

STATE'S BRIEF IN OPPOSITION.

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STATE'S BRIEF IN OPPOSITION.

(Note: All italics ours unless otherwise stated.)

The Facts.

John R. Longo was convicted in the Hudson County Court of Quarter Sessions upon an indictment which charged him with having violated Par. 434 of Chapter 187 P. L. 1930 (now Revised Statutes 19:34-2) pertaining to the New Jersey Election Laws. (See Appendix "A".)

He appealed by a strict writ of error to the New Jersey Supreme Court (See Appendix "B"), but the conviction was unanimously upheld. Cf. *State* v. *John R. Longo,* 121 N. J. Law 427; 3 Atl. Rep. (2nd) 127.

Simultaneously with the taking of this appeal, Longo applied to Part II of our Supreme Court for a writ of *certiorari* to review the denial by the trial judge of his

motion for a new trial. The motion was based upon affidavits (R. pp. 2 to 35) taken entirely *ex parte* and after the verdict was rendered. These affidavits alleged "false swearing" by certain of the jurors during their examinations on *voir dire*. The Supreme Court denied the application, *per curiam* (R. p. 53) stating "*We have examined the proofs submitted and deem the grounds upon which the writ is sought to be without merit.*"

This decision of the Supreme Court was thereupon appealed to the New Jersey Court of Errors and Appeals, which in turn unanimously affirmed the court below (Supp. to Record, p. 1). This court stated in its opinion (Supp. R. 8, l. 14), "*We have searched the record in vain for proper, legal proofs to support the tenuous claim made that some of the jurors swore falsely when examined upon their voir dire; it simply is not present.*"

The record before this Honorable Court is attenuated. The entire testimony of the *voire dire* examinations is not printed. All we have are *ex parte* affidavits of the defendant and certain persons taken after the trial and verdict. These persons were not witnesses at the trial and to this day, no opportunity was ever afforded the State for their cross examination. The affidavits themselves contain alleged quotations from counsel's examinations of the jurors (R., p. 3). These quotations are isolated questions and answers, removed from the complete text although the transcribed record has always been in counsel's possession. Without it, how can this court be asked to rule that the defendant was deprived of his constitutional rights?

Then again, there is still another factor in this case which must be noted: *Nowhere in the record, not even in the petitioner's affidavits, is there to be found the slightest*

contention of innocence of the crime for which he was convicted. Indeed, it could not be otherwise. Nevertheless, and despite the fact that his short term of confinement was concluded more than a year and a half ago, the net substance of his present application is to ask this court to rule upon the now mooted question of whether his procedure in the State Courts should have been by appeal or *certiorari.* Yet, both these courses were taken by him and ruled upon by our Courts! (Supp. Rec., p. 7, l. 12.)

It will be noted that the defendant's petition and brief deal exclusively with the alleged false swearing on the part of the jurors who sat in judgment. His entire case is thus founded upon a premise which our State's highest tribunals have unanimously found to be "without merit" and "simply non-existent".

The accused was tried and convicted upon an indictment which charged an offense against the laws of the State of New Jersey; he had a jury trial with full opportunity to investigate *before trial* the entire Master Panel of jurors from which was to be chosen the twelve persons who would sit in his case. (R., p. 36. See also opinion by Mr. Justice Perskie, Court of Errors and Appeals, and cases cited therein.) He had every opportunity to, and actually did examine upon their *voir dire,* the list of prospective jurors, exercise challenges, etc., until twelve persons *declared to be satisfactory to him* were finally chosen and sworn. He was deprived of no rights or privileges of whatever kind or nature and was fully heard on his own behalf.

Before proceeding with the State's principal argument, it might be well here to make reply to the points raised in the petitioner's brief.

1. "The Procedure in the State Supreme Court Was Proper." Here the point is attempted to be made that "*certiorari* will lie to review all legal errors of a subordinate tribunal, *where no other form of review is available*", and, "The New Jersey Court of Errors has ruled that the granting or denial of a new trial in a criminal case is not reviewable on writ of error."

This argument is utterly devoid of merit. The petitioner omits the all-important qualification that the granting or denial of a new trial in a criminal case is addressed to the sound discretion of the trial court, and no appeal will lie therefrom *unless the discretion is clearly abused. In re Longo, supra* (Record, p. 7, l. 26); *State* v. *Wood,* 23 N. J. Law 560, and cases cited in this opinion.

The law of New Jersey is long and firmly established that an appeal *will* lie from the exercise of judicial discretion, either on writ of error or by *certiorari,* where it has been clearly abused. *Labell* v. *Quasdorf,* 116 N. J. Law 368 (Ct. of Err. and App.), 184 Atl. Rep. 750; *Heuser* v. *Rothenberg,* 123 N. J. Law 319.

The petitioner has shown no abuse of discretion in the denial to him of a new trial. The *per curiam* opinion of our Supreme Court disposed of this question (Record, pp. 53-54) and again in the opinion of our highest court of appeals. (Supp. to Rec. at p. 1; at p. 7, ll. 12 and 29, *et seq.*) Longo has not nor does he now, deny his guilt, and therefor cannot claim to have been aggrieved by these rulings, nor to have suffered any manifest wrong or injury.

2. "The proofs below sustained the charge of false testifying", etc. There is nothing in the record to substantiate this baseless charge. No testimony is submitted to

support it, and the courts of New Jersey have adjudged this entire question to be "without merit" and "non-existent". This point is further developed under our "Point III".

Points III and IV of the petitioner's brief are answered herein under "Point I".

ARGUMENT.

POINT I.

Due process of law and equal protection of the law under State and Federal Constitutions were afforded to the petitioner at every stage of his trial and appeals in the Courts of New Jersey.

As already shown, petitioner was formally indicted for the violation of a state statute which in no sense is repugnant to the Federal Constitution; he was placed on trial before a court of competent jurisdiction with a jury lawfully constituted (Record, pp. 36 to 50 incl.). He had a public trial deliberately conducted, and an array of defense counsel outstanding for ability and reputation. He was found guilty after offering no real or meritorious defense, and was mildly sentenced to a very short term in the County Penitentiary. He appealed the conviction to Part I of our N. J. Supreme Court and at the same time applied to Part II of the same tribunal for a writ of *certiorari* to review the denial of his motion for a new trial. The appeal was dismissed (*State* v. *Longo,* 121 N. J. L. 427; 3 Atl. Rep. (2nd) 127), and the *certiorari* denied (R., pp. 53-54).

This latter ruling was then appealed to the highest court of our State, and, in a most carefully considered

opinion which delved deeply into the merits of the entire case, this appeal, too, was dismissed (Supp. to Record, p. 1).

No federal questions, therefore, are involved in this case.

It has repeatedly been held that the Supreme Court will not review irregularities or erroneous rulings by State Courts upon the trial, no matter how serious. *Frank* v. *Mangum,* 237 U. S. 309. Mr. Justice Pitney, in his opinion in this noted case, said: (p. 326)

> "As to the 'due process of law' that is required by the 14th Amendment, it is perfectly well settled that a criminal prosecution in the courts of a state, based upon a law not in itself repugnant to the Federal Constitution, and conducted according to the settled course of judicial proceedings as established by the law of the state, so long as it includes notice and a hearing, or an opportunity to be heard, before a court of competent jurisdiction, according to established modes of procedure, is "due process" in the constitutional sense. *Walker* v. *Sauvinet,* 92 U. S. 90, 93; 23 Law Ed. 678, 679; *Hurtado* v. *California,* 110 U. S. 516, 535, 28 Law. Ed. 232, 238, 4 Sup. Ct. Rep. 111, 292;" etc. etc. etc.

And again, at page 327:

> "And while the 14th Amendment does not require that a State shall provide for an appellate review in criminal cases (*McKane* v. *Durston,* 153 U. S. 684, 687; *Andrews* v. *Swartz,* 156 U. S. 272, 275; *Rogers* v. *Peck,* 199 U. S. 425, 435; *Reetz* v. *Michigan,* 188 U. S. 505, 508), it is perfectly obvious that where such an appeal is provided for and the prisoner has

had the benefit of it, the proceedings in the appellate tribunal are to be regarded as a part of the process of law under which he is held in custody by the State, and to be considered in determining any question of alleged deprivation of his life or liberty contrary to the 14th Amendment."

Cf. *Snyder* v. *Commonwealth of Massachusetts,* 291 U. S. Rep. 97; *Palko* v. *Connecticut,* 302 U. S. 319, 329.

The State of New Jersey by express statutes (Appendix B) and rules of procedure, amply provides all the necessary judicial processes to correct or remedy any alleged wrongs or errors of law, and therefore this Honorable Court should not invoke its jurisdiction. Cf. *Mooney* v. *Holohan,* 294 U. S. 103, 79 L. ed. (Adv. 347), 55 S. Ct. 340.

POINT II.

The jurors were chosen with strict observance to the long and well established laws of the State of New Jersey, and petitioner had ample opportunity to investigate their relatives, character, occupations and general reputations.

For details concerning the choosing and publication of the list of petit jurors, see "Affidavit of George A. Senior", Jury Commissioner of Hudson County (Record, p. 36).

It is elementary, of course, that "the right to challenge prospective jurors is not a right of selection, but rather of exclusion." *State* v. *Langhans,* 95 N. J. L. 213; *U. S.* v. *Marchant,* 12 Wheaton 480.

Because of the publication of the Master Panel of 3,000 petit jurors months in advance of the trial, and further

publication of the *specific* panel of 204 petit jurors more than 10 days prior to the dates of their service, the law of New Jersey is well established that **"The defense in a criminal case is not entitled to ask questions of a juror called to the book, no challenge being interposed, for the purpose of eliciting information on which to base a peremptory challenge". *Clifford* v. *State*, 61 N. J. L. 217, 39 Atl. 721; *State* v. *Palmieri*, 93 N. J. L. 195, 107 Atl. 407.**

Following this well known rule of procedure, the defense, in the case at bar, interposed "challenges for cause" and thereupon proceeded to question the prospective jurors upon their *voir dire* as to bias and prejudice.

It is the settled law of New Jersey, followed by our courts for over 150 years, that *when a "challenge for cause" is interposed, the party challenging must state the cause and thereupon proceed to prove it.* The court alone tries the issue thus raised, and it may be proved by documents, statements, other witnesses and by the juror himself. *To disqualify the juror upon grounds of bias or prejudice, the court must find not only the existence of bias and prejudice, but that the bias or prejudice is founded or conceived in malice or ill will against the party challenging, and that the juror, no matter what the evidence at the trial, will disregard it to adjudge the defendant guilty.*

Clifford v. *State, supra;*
State v. *Fox*, 25 N. J. L. 565;
State v. *Zellers*, 7 N. J. L. 220;
State v. *Lammens*, 3 N. J. Law Journal 100;
State v. *Spencer*, 21 N. J. L. 196, at p. 199;
Moschel v. *State*, 53 N. J. L. 498;
State v. *Turco*, 99 N. J. L. 96;
State v. *Simmons*, 120 N. J. L. 85.

An examination of these cases compels us to conclude that even if the very facts now complained of, even if true (our courts have thrice found them to be untrue) and actually disclosed during the *voir dire* examinations, they still would not be sufficient to sustain the challenges for cause, because there was utterly no proof that the alleged "prejudice and bias" were conceived in malice or ill will toward the accused. The record in this respect is utterly barren, except insofar as counsel's argument is concerned. For the legal definition of "malice or ill will", see *State* v. *Fox, supra,* and *State* v. *Simmons, supra.*

As was held in the *Clifford* case, *supra:*

> "The accused had the benefit of the knowledge of what jurors have been called to serve at the trial, and is even served with the panel out of which the jurors who are to sit in his case are selected. His counsel were thus offered every opportunity to inquire in respect to the jurors and gain the information they required in order to intelligently act in making peremptory challenges."

See also *State* v. *Palmieri, supra.*

Obviously, petitioner did not avail himself of the opportunities which the law afforded him. He and his array of counsel could easily have investigated not only the jurors themselves, but their relatives as well. They did not do so. Instead, they asked a few, and incidently improper questions, of a most general nature, and expressed themselves as satisfied with the general answers they obtained.

> "An objection that there was a prejudicial discrepancy between the statements of prospective jurors and their subsequent testimony is too late

when made for the first time in the motion for a new trial." (16 Corpus Juris, p. 1160, Criminal Law.)

Not a single juror in this case can justly be charged with consciously or deliberately swearing falsely. Reference is respectfully made to their answering affidavits filed in the trial court on the original motion for a new trial. (Record, pp. 38 to 50 incl.)

POINT III.

The jurors did not swear falsely on their *voir dire* examinations, and in no sense were they disqualified from serving in this case.

The State most emphatically contends that not one of the jurors swore falsely on his *voir dire* examination. It will not serve any useful purpose here to reconcile in detail the facts disclosed during these *voir dire* examinations with those alleged to have been "discovered" after the rendition of the verdict, for the simple reason that the Record or State of Case fails to include any portion of the transcript of their evidence during the course of their examinations.

Suffice it to say that up to the time Juror No. 11, Harry Ashe (the last to be called), was accepted in the box, the defendant still had one or more peremptory challenges available. *State* v. *Drake,* 53 N. J. L. 23; *State* v. *Juliano,* 103 N. J. L. 663. Therefore, it cannot be said that the defendant suffered any manifest harm or injury.

If it was counsel's purpose to ask question in order "to intelligently exercise his right to peremptory challenges", rather than to sustain or prove the "challenge for cause",

then, of course, the examination was improper and the questions should have been excluded because the criminal procedure of our State does not permit such questioning for this purpose. *Clifford* v. *State, supra. Voir dire examinations are permitted only for the purpose of proving, or establishing, or sustaining challenges for cause stated to the Court.*

The very questions asked in the case *sub judice* were held improper by this court in *Connover* v. *United States,* 158 U. S. 408, 15 Sup. Ct. Rep. 951.

> "Questions to a juror as to his political affiliations are properly rejected in a trial for an election offense; and even the question whether the political affiliations or party predilections of the juror would tend to bias his judgment, should not be permitted in the absence of any special reason or ground therefor."

Applying the above rule to the matter *sub judice,* it may well be held that if these questions are improper as to the jurors themselves, how much more so must they be when they concern the uncles, brothers-in-law, cousins, etc., of the prospective jurors?

Some of the questions ruled out by this Court in the *Connover* case (*supra*) are:

> 3. Q. "Did you take an active part in the politics in the general election of November, A. D. 1890; and if so, with which of the parties did you affiliate and where?"
>
> 4. Q. "Have you been heretofore or are you now strongly partisan in your political beliefs?"
>
> 5. Q. "Would your political affiliations or party predilections tend to bias your judgment in this case either for or against this defendant?"

7. Q. "Were you ever at any time a judge or clerk of an election; and if so, when and where, and by what party were you named and appointed?"

8. Q. "Are you a member of any political club organized for the advancement of the interests of any political party; and if so, what party?"

Cf. *In re Spies* (*Spies* v. *Illinois*), 123 U. S. 131, and Sup. Ct. Rep. 21, 22; *Thiede* v. *Utah,* 159 U. S. 510, 16 Sup. Ct. Rep. 62, where it was also held that "Jurors, even where they have formed an opinion based upon newspaper articles, are not incompetent or disqualified when they state that they can lay aside any such opinions or impressions and try the case fairly and impartially upon the evidence presented."

That is just the situation here. *All* of the jurors so stated under oath and the record would clearly disclose this, if fully printed and submitted to this Honorable Court.

For example, page 62 of the transcribed minutes of the trial would show:

Questions by Mr. Marcantonio of juror David Morrisroe:

* * * * * * *

Q. "If it should develop at the trial that this defendant has different political views from your own, would that in any way prejudice you against him? A. No, sir."

Questions by Mr. Marcantonio of juror Harry Ashe:

* * * * * * *

Q. "Have you formed any opinions with regard to this case? A. No."

> Q. "If it develops at this trial that the political views of this defendant are not in accord with yours with regard to the present city administration in Jersey City and Hudson County, would that in any way prejudice you against the defendant? A. No, sir."

All of the jurors were similarly interrogated and all replied they would be guided in their judgment as to guilt and innocence solely by the evidence presented in open court.

Petitioner, John R. Longo, would seem to have it established as a matter of law, that he was entitled to a trial by a jury composed solely of his friends or persons of his own political faction, if indeed, such a faction actually existed.

Moreover, the objection to the jurors came much too late, and the whole case has already been ruled upon adversely to the petitioner by our Trial and Appellate Courts, all of which were legally and competently constituted and had full jurisdiction over the subject matter and the parties.

In *State* v. *Garzio,* 113 N. J. L. 349 (affirmed on appeal 116 N. J. L. 189) our courts ruled upon a very similar situation. There, a new trial was sought because it was alleged that one of the jurors swore falsely on *voir dire.* He was asked whether he knew a person mentioned in the indictment, and he answered "No". Testimony was taken on that point, *and the trial judge found as a fact* (as is the case here) *that the juror had not sworn falsely.* On appeal, the Supreme Court held:

> "Findings of fact by the Trial Judge on rules to show cause for a new trial based on an alleged

misconduct of the jury and attendants, and on an allegedly false answer by a juror to a question asked of him before he was accepted and sworn, will not be reviewed in error, where there was any evidence to support them".

The trial court in the case at bar fully considered the contents of the defendant's petition and the affidavits of the "investigators" *employed after the verdict.* He also had before him the answering affidavits filed by the State. He gave much time to counsel's oral arguments, and his rulings have been consistently upheld on appeal by unanimous votes of the appellate courts.

Unquestionably the findings of fact on this point by the appellate courts of our State, should be entirely dispositive of this baseless argument by the petitioner. Our Court of Errors and Appeals, the court of last resort in all causes, seems to have thoroughly gone into this whole question, and we respectfully submit that its unanimous findings should be left undisturbed. Two separate parts of our state Supreme Court have likewise ruled against Longo on his charges against the jurors. Under these circumstances, and following the established law, the Supreme Court of the United States should not now interfere.

POINT IV.

Petitioner having served his sentence is barred from further appeal, the case now being moot.

The judgment of conviction against John R. Longo carried a sentence of nine months in the Hudson County Penitentiary and thence until the costs were paid. *After serving*

this sentence, the appellant was discharged from custody on January 16th, 1939. A few days prior thereto the Hudson County Board of Freeholders, by a resolution, remitted the costs.

It has long been the settled rule of law in this jurisdiction as well as our Federal Courts, that appellate courts will not spend its time in deciding moot questions of law or fact or in entertaining appeals on moot cases. Cf. *In Re Lincoln,* 202 U. S. 178. In that case, Lincoln applied for a writ of *habeas corpus* after having been sentenced for transporting liquor onto an Indian Reservation. The sentence was sixty days in jail, plus a fine of $100. Mr. Justice Brewer, speaking for our United States Supreme Court, held:

> "Where petitioner's term of imprisonment has expired, but under the sentence he is still subject to confinement until a fine of $100.00 and costs has been paid, and nothing in the record shows whether such fine has been collected on execution, as authorized by the sentence, but if not collected or collectible, the petitioner can shortly be discharged on taking the poor debtor's oath, the case is practically a moot one, upon which the time of this court should not be spent."

So in the case at bar, Longo was tried and convicted. He served his sentence and was released more than a year and a half ago (Jan. 16, 1939). The whole case therefore has become moot, and it will not avail the appellant at this late date to have this Court now pass upon the question as to whether or not the New Jersey Courts erred in denying his application for a new trial.

Nor is petitioner's case aided in any way by the certainty of his guilt of the crime for which he was convicted. As has already been pointed out, nowhere does he assert his innocence of this State offense, and a new trial would therefore result in the same judgment of conviction. Under these circumstances alone, the Supreme Court of the United States should not now intervene.

Conclusion.

A careful examination of the petition and brief filed by the petitioner in this case will reveal that:

1. No substantial Federal question is involved in these proceedings or any phase thereof.

2. The defendant was lawfully indicted and convicted of a State offense and the conviction upheld by our appellate courts having competent jurisdiction on appeal.

3. Due process of law and the equal protection of the law were afforded to the petitioner throughout his trial and the appellate proceedings which followed.

4. All the constitutional privileges and immunities to which the petitioner was entitled were amply afforded him and his rights fully safe-guarded.

5. Petitioner has not shown that any of the jurors were incompetent or otherwise disqualified; or that they were biased and prejudiced against the defendant, or that such bias and prejudice were conceived in malice or ill will toward him; or that any of the jurors swore falsely upon their *voir dire* examinations.

6. The case presents only a moot question which this Court should not now consider.

7. There is nothing in this case which would warrant the intervention or jurisdiction of the Supreme Court of the United States under Section 237 (B) of the Judicial Code, or under Rule 38, par. 5(a) of this Court.

It is therefore respectfully submitted that in the exercise of its own sound judicial discretion, the Supreme Court of the United States should deny petitioner's application for a writ of *certiorari*.

The decision of the New Jersey Court of Errors and Appeals is in full accord with the applicable decisions of this Honorable Court and should not be disturbed.

Jersey City, N. J.
Dated: July 16, 1940.

Respectfully submitted,

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